



Washington Headquarters Services Office of General Counsel

Ask, But Don't Tell (Too Much): Contacts With Industry

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Disclaimer

- Questions
 - General Questions
 - Specific questions must be addressed to OGC or Ethics Counselor outside of this training

Overview

- Applicable regulations
- Provide overview of limitations and restrictions applicable to government employees discussions with DoD contractors
- Implications for disclosure

References

- Federal Procurement Integrity, Section 27, Office of Federal Procurement Policy Act (41 U.S.C. 423)
- Federal Acquisition Regulation Part 3 - Improper Business Practices & Personal Conflicts of Interest; Subpart 3.104 – Procurement Integrity
- Joint Ethics Regulation

Feb 2, 2011, Office of Federal Procurement Policy states that “information gathered from industry sources plays an invaluable role in the acquisition process—agencies must develop practices that will ensure early, frequent and constructive communication during key phases of the process.”

Goal: Provide you with an overview of limitations and restrictions applicable to government employees discussions with DoD contractors

Market Research Requirements and Precautions

- Market research means “collecting and analyzing information about capabilities within the market to satisfy agency needs”
FAR 2.101
- Agencies “must” (a) conduct market research on an ongoing basis to identify legitimate needs and acquire items that meet those needs and (b) to the maximum extent practicable, take advantage of commercially available market research methods to identify industry capabilities
FAR 10.001

Available market research tools include (FAR 10.002):

- Contacting knowledgeable persons within industry and Government to determine market capabilities
- Publishing formal requests for information in appropriate technical or scientific journals
- Participating in interactive, on-line communications among industry
- Reviewing catalogs and other generally available information from industry
- Conducting interchange meetings or pre-solicitation conferences to involve potential vendors early in the acquisition process

Procurement Integrity Act

41 U.S.C. 423

Prohibits a “person” (including Government employees) from knowingly disclosing “contractor bid or proposal information” or “source selection information”

Prohibits a “person” from improperly and knowingly obtaining “contractor bid or proposal information” and “source selection information”

Procurement Information

- Draft statements of work/performance work statements and related technical supporting data on pending or proposed procurements typically represent protected “procurement information”
- Treat ALL applicable information as FOUO until properly released by authorized sources

- “Procurement information” may only be released by AUTHORIZED contracting officials, NOT through inappropriate discussions by government employees with contractor or other private parties seeking to do business with the government

What are the Penalties for Violations?

- **Criminal Penalties** for knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information
- **Civil Penalties** for knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors



What are the penalties for violation?

The following **Administrative Actions** apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors:

- Cancellation of the procurement.
- Disqualification of an offeror.
- Rescission of the contract.
- Suspension or debarment of the contractor.
- Initiation of an adverse personnel action.
- Any other action in the best interest of the Government.
- Additional costs and delays to the Government.

What is an Organizational Conflict of Interest?

Defined in FAR 2.101

“Organizational conflict of interest” means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

3.502-1 defines person. “Person” means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest

Types of OCIs

- Biased Ground Rules
- Impaired Objectivity
- Unequal Access to Information

Biased Grounds Rules

“...situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these ‘biased ground rules’ cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself....These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future

Impaired Objectivity

“...cases where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals....In these ‘impaired objectivity’ cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated....” *Aetna, B-254397, July 27, 1995.*

Unequal Access to Information

“...consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract....these ‘unequal access to information’ cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.” *Aetna*, B-254397, July 27, 1995.

OCIs May Arise If

- Contractor and Government Personnel Close Working Relationship
- Contractor personnel contribute to drafting the SOW
 - This is true no matter how significant a contribution
 - This will not necessarily halt the acquisition process. We may be able to avoid, mitigate, or neutralize the OCI

OCIs May Arise If

- Contractor personnel provide technical advice to government personnel during the acquisition process, even if just in passing
- Contractor personnel respond to offeror/vendor questions
 - Ex. Industry day

Ethics Issues

JER 3-204

Impartiality of DoD Employees. DoD employees are generally prohibited from

- engaging in any official activities in which
- a non-Federal entity is a party or has a financial interest if the DoD employee
 - is an active participant in the non-Federal entity or
 - has been an officer in the non-Federal entity within the last year.

Ethics Issues

18 U.S.C. §208

Conflicting Financial Interests: DoD employees are prohibited from:

- Participating personally and substantially in an official capacity
- In any particular matter that has
 - A direct and predictable effect on their financial interests
 - Or upon those financial interests imputed to them (spouse, children, etc.)

Ethics Issues

JER 3-200

Attendance at Meetings, Conferences:

- DoD employees may be permitted to attend meetings, conferences, seminars, or similar events sponsored by non-Federal entities in their official DoD capacities at Federal Government expense if there is a legitimate Federal Government such as training a DoD employee beyond maintaining professional credentials or gathering information of value to the DoD
- If attendance is solely to acquire or maintain professional credentials that are a minimum requirement to hold the DoD position, attendance is not permissible

Ethics Issues

5 CFR Part 2635

GIFTS: DoD Employees May Not Solicit, Accept, or Coerce the Offering of Gifts from Prohibited Sources

- “Gift” can be (Cash, Food, Services, Tangible items, Entertainment, Hospitality, Gratuity, etc.)
- “Prohibited Source” means any person or entity which:
 - Seeks official action by OSD
 - Does or seeks to do business with OSD
 - Has interests that may be substantially affected by performance of your official duties
 - Is an organization a majority of whose members are prohibited sources to OSD

Ethics Issues

- Exceptions or “Non-Gifts” (But See Your Ethics Advisor!)
 - Snacks (not part of a meal)
 - Items of little intrinsic value (certificates, trophies)
 - Loans/credits from institutions at publicly available rates
 - Anything for which you paid fair market value
 - Anything paid for by the Government
 - Gift accepted by the Gov’t under statutory authority
 - Opportunities and benefits available to the public or all government employees
 - Pensions and other benefits resulting from continued participation in an employee welfare & benefit plan
 - Rewards and prizes open to the public

Rules of Thumb

- Preserve Competitiveness; maintain a level playing field
 - Primary goal is to learn as much useful information as possible without creating unequal access to information (conflict of interest), preferential treatment, creating statements of work unfairly influenced by a specific vendor (conflict of interest) or ethics violations
 - Be sensitive to whether a meeting, action, or release of information would give a competitive advantage to a contractor
 - All similarly situated contractors should receive equal treatment
 - When speaking with a contractor, assume that you are speaking with the entire DoD community
 - All procurements are to be conducted fairly,

Rules of Thumb, cont.

- Reaching out to personal contacts in industry may taint the procurement
- Seek informational and clarifying questions during a briefing; avoid asking contractors to submit follow-up information
- Before meeting with a contractor, the contractor should identify the name of the firm, the topic for discussion, and any current contracts or active proposals that the firm has pending with the requiring activity
 - This information will be provided to the Contracting Officer at a later date

Rules of Thumb, cont.

- Do not reveal vendor trade secrets or proprietary information
- Keep accurate records concerning information received from vendors, communications and meetings with vendors
- Vendors / Contractors often direct communications and inquiries toward the potential user of a product or service being offered to the requiring activity
 - This may be military or civilian personnel, regardless of rank

Rules of Thumb, cont. Email Communications

- Many contractor employees have daily access to government e-mail systems
- Do NOT assume that an inquiry via e-mail is being sent from another government employee or a contractor privy to that information under a non-disclosure agreement
- Before releasing sensitive procurement information KNOW WHO YOU ARE SENDING IT TO

Rules of Thumb, cont.

- Do NOT disclose “inside information”
 - Information not available to the public under the Freedom of Information Act
 - Information protected under the Privacy Act, Trade Secrets, and classified material
 - Do not disclose procurement sensitive information, specific agency requirements or acquisition strategies that are not otherwise made available to all vendors
 - Acquisition information (ie, unopened bids, proposed costs, independent government estimate, source selection plans, price evaluations, competitive range determinations, proprietary information, source selection

Rules of Thumb, cont.

- Do not give preferential treatment to any private party
- Do not make any unauthorized commitments, promises, or representations on behalf of or that would compromise the Government's position
- Do not offer advice or suggestions to contractors
- One-on-one meetings are permissible; however, multiple Government employees should attend

Rules of Thumb, cont.

- Avoid superlatives or other comments concerning the vendor's products/services/capabilities and whether/how the products/services/capabilities meet or do not meet Government needs
- Include small businesses in your market research plan
- Advise vendors that the Government is communicating with many industry representatives
- Decline meetings with contractors once a solicitation has been released to avoid an

Inadvertent Disclosure

- Disclosure may jeopardize the entire procurement
 - Current planning
 - Impair the integrity of the procurement process
 - Budget implications
- Use common sense when responding to an inquiry
- Report any incident of a disclosure or improper inquiry to your supervisor
- Supervisors should report the incident to the Ethics Counselor and the Contracting Officer

Questions?



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